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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204897
Party	Defendant Laguna Lakes Community Association, Inc.
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Attachments	Response to Motion to Compel Proper Corporate Rep or Donna.pdf(186800 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

John Gerard Marino,	)	**Consolidated Opp. No. 91/204,897**
	)	**91/204,941**
Opposer,	)	
	)	**OPPOSITION TO MOTION TO**
v.	)	**COMPEL DEPOSITION OF**
	)	**CORPORATE REPRESENTATIVE**
Laguna Lakes Community Association, Inc.,	)	**OR DONNA FLAMMANG, ESQ.**
	)	**AND FOR SANCTIONS**
	)	
Applicant.	)	

I. Introduction and Factual Overview.

The most recent Motion to Compel ("Motion") filed by Opposer, John Gerard Marino ("Marino"), is chockfull with misrepresentations, distortions, and omissions of fact and law necessitating its denial. On August 23, 2013, Marino took the deposition of Applicant's Rule 30(b)(6) representative (the President of its Board of Directors, Patrick Tardiff), concerning thirteen (13) topics listed in Exhibit A to the Motion. Marino now incorrectly complains that: (1) Applicant's Rule 30(b)(6) witness "had no knowledge of categories 1, 2, or 6," *see* Motion at ¶3, and (2) that Applicant's Attorney, Donna M. Flammang, Esq., should be produced for deposition because she allegedly is "the person with the most knowledge of the issues asked." *Id.* at ¶5.

However, as explained below, the deposition transcript unambiguously reveals that Applicant's Rule 30(b)(6) witness had knowledge of categories 1, 2 and 6. Further, the law does not require production of a Rule 30(b)(6) representative with the "*most* knowledge on a certain topic." *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 692 (S.D. Fla. 2012). "Not only does [Federal Rule 30(b)(6)] not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule" and is "illogical." *Id.* at 688 (citing *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894–95 (7th Cir. 2004)).

II. Law and Argument.

A. The Record Demonstrates The Witness Had Ample Knowledge of Category 1.

Marino's allegation that Applicant's Rule 30(b)(6) witness had no knowledge on "[t]he first use of the marks applied for with the USPTO" is entirely false and contradicted by the deposition transcript.[1] For example:

> **Q. And, again, you were designated as the corporate rep with the most knowledge of the various issues set forth on attached Exhibit A. And one of the issues was the first use of the marks applied for with the USPTO. When was it that you believe Laguna Lakes Community Association, Inc. first started using the Laguna Lakes stylized name and logo that you have applied for trademarks on?**
> A. When is the first time? To my knowledge, it would be September of '03 . . . .

Tardiff Tr. at pp. 84:24 – 85:4. The testimony of Applicant's Rule 30(b)(6) witness regarding "[t]he first use of the marks applied for with the USPTO" was further substantiated and testified to later in the deposition:

> **Q. Okay. Isn't it true that this would be the application for the trademark on the Laguna Lakes logo?**
> A. Yes.
> **Q. And on the third page of this document, it says first use anywhere, at least as early as October 6th, 2003. Do you know -- where did that date come from, October 6th, 2003?**
> A. I believe at that time, when this was going through, that there was a second application to the county at -- at that date [October 6, 2003] . . . .

Id. at pp. 109:24 – 110:9.

Beyond any dispute, the Rule 30(b)(6) witness maintained ample knowledge about category 1. Whether anyone else, including Applicant's Attorney, Donna M. Flammang, Esq., is the person with the "most knowledge" is irrelevant as explained in the "*de facto* Bible governing corporate depositions":

[1] Applicant notes that Marino failed to file a proper copy of the deposition transcript. The copy filed by Marino does not include (1) a signed copy of the Errata Sheet signed by the deponent, or (2) a copy of the exhibits used and discussed during the deposition. The Board should, therefore, deny the Motion to Compel for lack of proper support.

> [A] Rule 30(b)(6) witness need not have personal knowledge of the designated subject matter.
>
> * * *
>
> The rule does not expressly or implicitly require the corporation or entity to produce the "person most knowledgeable" for the corporate deposition. Nevertheless, many lawyers issue notices and subpoenas which purport to require the producing party to provide "the most knowledgeable" witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have any personal knowledge, so the "*most* knowledgeable" designation is illogical. * * * And permitting a requesting party to insist on the production of the most knowledgeable witness could lead to time-wasting disputes over the comparative level of the witness' knowledge. For example, if the rule authorized a demand for the most knowledgeable witness, then the requesting party could presumably obtain sanctions if the witness produced had the *second* most amount of knowledge. This result is impractical, inefficient and problematic, but it would be required by a procedure authorizing a demand for the "most" knowledgeable witness. But the rule says no such thing.

QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 688-89 (S.D. Fla. 2012) (internal citations omitted and underlined added). What Marino is requesting in the Motion is not permitted and, consequently, is entirely improper because Rule 30(b)(6) "does not expressly or implicitly require" production of "the person most knowledgeable." *Id.* His insistence on the production of the most knowledgeable witness is nothing more than a time-wasting dispute that is impractical and inefficient.

Regardless, the deposition transcript demonstrates that Applicant's Rule 30(b)(6) witness had ample knowledge on "[t]he first use of the marks applied for with the USPTO."

B. The Record Demonstrates The Witness Had Ample Knowledge of Category 2.

Marino's allegation that Applicant's Rule 30(b)(6) witness had no knowledge on "[t]he information contained on the application to the USPTO" is also entirely false and contradicted by the deposition transcript.

Q. Okay. And where it says here, too, that all the statements in here are true and are believed to be true, you don't have any knowledge of whether or not any of the statements in this application are true or believed to be true, correct?

A. I would actually have to go over step by step before I actually answered something like that.

Tardiff Tr. at p. 121:7-13. Rather than allow the Rule 30(b)(6) witness to review the trademark applications, Marino shifted gears into improperly asking about "who would have the most knowledge as to what was put in this application and why." *Id.* at p. 121:15-18.[2]

When asked questions about the trademark applications, Applicant's Rule 30(b)(6) witness capably, and knowledgably, responded. For example, Applicant's Rule 30(b)(6) witness testified about the date of first use of the marks. *See, e.g.*, *id.* at pp. 84:24 – 85:4; *id.* at pp. 109:24 – 110:9 (discussed *supra*). Applicant's Rule 30(b)(6) witness also testified about the website listed in one of the trademark applications:

Q. You would agree that the Laguna Lakes Community Association has never owned LagunaLakes.com, correct?

A. Correct.

Q. So, that would be a -- completely inaccurate information contained here in this application, correct?

A. I would say it was a typo, yes.

Q. Why would you say it's a typo?

A. Because right down here it says www.LagunaLakesAssociation.com.

Id. at p. 124:9-18.

The deposition transcript confirms that Applicant's Rule 30(b)(6) witness possessed ample knowledge on "[t]he information contained on the application to the USPTO." Marino's crusade to depose Applicant's Attorney, Donna M. Flammang, Esq., (or any other person) because she may allegedly be the "most knowledgeable" person on the topic is entirely impermissible and should be denied by the Board. *QBE Ins. Corp.*, 277 F.R.D. at 688-89.

[2] In addition, because Applicant is not seeking a concurrent use registration, it is not required to list any alleged concurrent users. *See* TMEP § 1207.04(d)(3). All questions regarding why Marino or others were not listed in the applications are entirely irrelevant and improper. *See, e.g.*, Tardiff Tr. at pp. 119:3-15.

Regardless, Marino failed to demonstrate what else Attorney Flammang could provide beyond that already testified to by Applicant's Rule 30(b)(6) witness (and the other deponents). This is likely because, contrary to Marino's assertions here, Applicant's Rule 30(b)(6) witness had ample knowledge about "[t]he information contained on the application to the USPTO."

C. The Record Demonstrates The Witness Had Ample Knowledge of Category 6.

Marino's allegation that Applicant's Rule 30(b)(6) witness had no knowledge on "[w]hether any transfer of the marks was ever made by Transeastern Homes or any TOUSA entity" is also entirely false and, again, contradicted by the deposition transcript.

Q. So, it's your contention that you all have inherited the logo by virtue of the quitclaim deed we just went through before?
A. That's absolutely correct.

Tardiff Tr. at p. 82:10-13. The quitclaim deed transferring property referenced by Marino was produced by Applicant with the bates-label LL-97, and is dated December 2, 2003. Applicant's Rule 30(b)(6) witness again capably, and knowledgably, responded to questions about the quitclaim deed.

Q. Okay. Well, if you look at LL-97, it should be the quitclaim deed dated December 2nd, 2003.
A. Okay.
Q. It indicates apparently that you were deed -- quitclaimed property -- Laguna Lakes Community Association was quitclaimed property from Transeastern Laguna Lakes, LLC, correct?
A. Okay, yes.

* * *

Q. And under this quitclaim deed also, it says the property that was conveyed hereby is intended to be common area pursuant to the master declaration for Laguna Lakes, right?
A. Yes.
Q. Does the master declaration for Laguna Lakes define what the common area is?
A. Yes.

Q. Okay. So, you would agree that under this quitclaim deed, Transeastern Laguna Lakes, LLC was giving -- or turning over to Laguna Lakes Community Association, Inc. the common area as defined in the master declaration for Laguna Lakes, correct?

A. Correct.

Id. at pp. 61:17 – 62:22.

Marino is aware that, apart from Applicant's first use of the "Laguna Lakes" name and logo marks at least as early as October 6, 2013, Applicant also contends that a Transeastern entity transferred the marks to Applicant on December 2, 2003 (if not earlier). *Id.* at p. 82:10-13. While Marino may not like this answer, that was the response given by Applicant's Rule 30(b)(6) witness. Marino's dislike of the response does not permit him to wrongfully allege that the Rule 30(b)(6) witness had no knowledge on "[w]hether any transfer of the marks was ever made by Transeastern Homes or any TOUSA entity."

In short, the deposition transcript demonstrates that Applicant's Rule 30(b)(6) witness had ample knowledge on "[w]hether any transfer of the marks was ever made by Transeastern Homes or any TOUSA entity."

D. The Request to Depose Donna M. Flammang or Anyone Else Should Be Denied.

As explained at length above, Marino's request to depose Applicant's Attorney, Donna M. Flammang, Esq., or anyone else, should be denied by the Board. Marino did not allege that Applicant's Rule 30(b)(6) witness possessed no knowledge on categories 3, 4, 5, and 7-13. Furthermore, the deposition transcript clearly and unambiguously contradicts Marino's bald, incorrect assertion that Applicant's Rule 30(b)(6) witness "had no knowledge of categories 1, 2, or 6." *See, e.g.*, Motion at ¶3. Apart from the continued harassment of Applicant and delay of these proceedings, there is no reason for Marino to conduct anymore depositions.

As evidence of this harassment, Marino misrepresents that Attorney Flammang was the President of Applicant's Board (*see* Motion at ¶2). The misrepresentation is likely intentional because Marino knew, but failed to disclose in the Motion, that Patrick Tardiff, Applicant's Rule 30(b)(6) witness, was in fact the Board President, not Attorney Flammang. *See* Tardiff Tr. at p. 121:22-24 ("You, as the association president, . . ."); *id.* at p. 122:8-11 ("As the president of the association, did you . . . ."); *id.* at pp. 136:23 – 137:2 ("Would you agree, as the president of the association . . . .").

Moreover, Marino's inflammatory and baseless claim that Applicant's Attorney, Donna M. Flammang, Esq., "hoisted herself into this conflict of interest" is not only wrong, but irrelevant for several reasons. *Id.* at ¶6. First, there is no "conflict of interest." Second, Marino made no attempt in his Motion to demonstrate how the information he seeks is not privileged. *See Lloyd Lifestyle Ltd. v. Soaring Helmet Corp.*, No. C06-0349C, 2006 WL 753243 at *2 (W.D. Wash. Mar. 23, 2006) (explaining – with regard to a deposition noticed in a TTAB proceeding for the opposing party's attorney who had prepared and filed a trademark application and executed the associated declaration – that "[a]lthough the information [opposing counsel] possesses about his declaration and the parties' pre-registration negotiations may be relevant to the parties' dispute in the TTAB, [the party seeking the deposition] has not made a showing that this information is non-privileged"). As was true in *Lloyd Lifestyle*, Marino failed to demonstrate how the information he seeks is not privileged. *See, e.g.*, Tardiff Tr. at p. 97:2-15 (objection to question concerning Attorney Flammang on grounds of attorney-client privilege); *id.* at p. 98:9-13 (same); *id.* at p. 99:9-22 (same); *id.* at p. 122:8-18 (same).

Accordingly, there is no need for anymore depositions. Consequently, Marino's request to depose Applicant's Attorney, Donna M. Flammang, Esq., or anyone else, should be denied.

E. Marino Is Not Entitled to Select Applicant's Rule 30(b)(6) Witness.

Under the Federal Rules, Marino is not permitted to select Applicant's Rule 30(b)(6) witness. *See, e.g., Wyeth v. Lupin Ltd.*, 252 F.R.D. 295, 296 (D. Md. 2008) ("[The depositing party], of course, cannot dictate to [the noticed corporation] whom it should produce as its 30(b)(6) designee."); *see also* Fed. R. Civ. P. 30(b)(6) (placing the burden on noticed party to produce the 30(b)(6) designee). Although there is no need for Applicant to produce any other Rule 30(b)(6) witnesses (for the reasons explained above), in the event Applicant is compelled to produce a 30(b)(6) witness with additional knowledge on categories 1, 2, and 6, Marino is not entitled to select the witness, *see Wyeth, supra*, or request the individual with the "most knowledge" on these topics. *See QBE Ins. Corp., supra.*

F. Marino's Request for Sanctions is Without Merit and Should Be Denied.

Marino incorrectly alleges that "he still does not have complete discovery." Motion at ¶7. This is entirely untrue for at least two reasons. First, on September 10, 2013, Applicant sent supplemental discovery to Marino. *See* 9-10-2013 letter to Scott Behren attached hereto as Exhibit "1." Not once has Marino claimed in the past six (6) weeks that said discovery, together with all other discovery responses produced to him, is not complete. Second, Applicant's Rule 30(b)(6) witness provided complete, knowledgeable responses concerning all of the noticed categories 1-13 following good faith, conscientious preparation; this is all the Federal Rules require. *See, QBE Ins. Corp., supra.*

Quite simply, any feigned allegations that Marino does not have "complete discovery" or needs more time for discovery is no one's fault but his own. *See, e.g.,* TBMP § 403.04 ("Mere delay in initiating discovery does not constitute good cause for an extension of the discovery period."); *Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303 (TTAB 1987) ("If a party believes

that issues in a case are complex and may involve lengthy discovery, it is his responsibility to begin taking discovery early in the discovery period. To allow an extension for all purposes herein would be to reward [the party taking discovery] for its delay in initiating discovery, a result which is to be discouraged.").

For all of these reasons, Marino's request for sanctions should be denied.[3]

III. Conclusion.

For each and every one of the foregoing reasons, Applicant, Laguna Lakes Community Association, Inc., respectfully requests that the Board issue an Order denying the Marino's Motion to Compel.

Respectfully submitted,

/s/ Chad R. Rothschild

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Dated: October 28, 2013

[3] Applicant reserves the right to seek sanctions for Marino's violation of the Standard Protective Order by filing a copy of the Tardiff deposition transcript despite the fact it was designated by Applicant as CONFIDENTIAL. *See* Exhibit 1 (attached hereto).

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October 2013, a copy of the foregoing *Opposition to Motion to Compel Deposition of Corporate Representative or Donna Flammang, Esq. and For Sanctions* was served by e-mail upon:

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/s/ Chad R. Rothschild
One of the Attorneys for Applicant

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September 10, 2013

CONFIDENTIAL COMMUNICATION

VIA EMAIL ONLY (scott@behrenlaw.com; scott.behren@gmail.com)

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Re: ***Marino v. Laguna Lakes Community Association, Inc.***
TTAB Consolidated Opposition Proceeding No. 91/204,897

Dear Attorney Behren:

Please accept this letter and the attached documents bates-labeled LL 171 - LL 472 as supplemented discovery responses from Laguna Lakes Community Association, Inc. ("Applicant") issued pursuant to the agreement reached by the parties during the telephonic conference held with the Interlocutory Attorney on Tuesday, August 27, 2013. This letter and the attached documents are in addition to the supplemental information you obtained during the deposition of Applicant's Fed. R. Civ. P. 30(b)(6) witness.

The attached documents bates-labeled LL 171 - LL 472 represent the board of director meeting minutes you requested following the depositions on Friday, August 23, 2013. The documents have been marked as **CONFIDENTIAL** pursuant to the TTAB's Standard Protective Order and rules. *See* TBMP § 412.01 (explaining that "the Board's standard protective order is automatically in place to govern the exchange of information . . ."); *see also* Standard Protective Order (attached hereto). Given the **CONFIDENTIAL** designation, these documents (in addition to this letter) are to be shielded by you and Mr. Marino from public access.

REDACTED - CONFIDENTIAL

EXHIBIT 1

REDACTED – CONFIDENTIAL

In the interests of resolving this discovery dispute, Applicant recently obtained the attached discovery documents LL 171 – LL 472 from Alliant Association Management and is now producing the same to you. Together with LL 1 – LL 170 (along with Applicant's website www.lagunalakesassociation.com and two application files), you should be in possession of all documents responsive to your Requests for Production of Documents, and should have full and complete discovery responses.

Last, the deposition transcripts for Patrick Tardiff, Jeff Kelly, Mary Ann Cowart and Robert Hajicek were sent to the parties today. While we are assessing the "highly confidential" nature of these transcripts for purposes of the Board's Standard Protective Order, in the interim please treat these as **CONFIDENTIAL** at the minimum.

If you have any questions or comments following your review of this letter and the attached, please do not hesitate to contact us.

Sincerely,

Chad R. Rothschild, Esq.

encl.

cc: W. Scott Harders (via e-mail)
Donna M. Flammang (via e-mail)

EXHIBIT 1